APPENDIX

Kenneth Darrell QUINCE, Appellant,

v.

STATE of Florida, Appellee.

No. 59954.

Supreme Court of Florida.

March 4, 1982.

Rehearing Denied May 27, 1982.

Defendant was convicted in the Circuit Court, Volusia County, S. James Foxman, J., after he entered pleas of guilty to charges of felony-murder in the first degree and burglary. Direct appeal was taken from the imposition of the sentence of death. The Supreme Court held: (1) the trial judge did not err in giving only little weight to the sole mitigating factor, substantial impairment of defendant's capacity to appreciate the criminality of his act or to conform his conduct to the law; (2) the severe beating, wounding, raping and manual strangulation of an 82-year-old frail woman easily qualified as heinous; (3) it was not improper to double the aggravating circumstances when the judge found that the homicide was committed during a rape and was committed for pecuniary gain; (4) the record did not support the defendant's claims of additional mitigating factors; (5) both sides had equal opportunity for closing argument; and (6) even though it was improper to impose a general sentence for two separate offenses, there was no harm where the death penalty had been approved.

Sentence of death approved.

1. Criminal Law ⇐1208(1)

Defendant may be competent to stand trial, and yet nevertheless receive benefit of mitigating factors involving diminished mental capacity in determining whether death penalty should be imposed.

2. Homicide ⇐354

In imposing sentence of death following conviction of felony-murder in first degree and burglary predicated on guilty pleas, trial judge recognized "substantial impairment" mitigating factor and it was not unreasonable to fail to give great weight to that mitigating factor in light of three aggravating factors which had been found.

3. Homicide ⇐354

Severe beating, wounding, raping and manual strangulation of 82-year-old, frail woman qualified as "heinous" to justify imposition of death penalty.

See publication Words and Phrases for other judicial constructions and definitions.

4. Homicide ⇐354

When death penalty was imposed on defendant after conviction of felony-murder in the first degree and burglary predicated on guilty pleas, there was no improper doubling of aggravating circumstances when judge found that homicide was committed during rape and committed for pecuniary gain.

5. Homicide ⇐354

In imposing death sentence on defendant after conviction of felony-murder in first degree and burglary predicated on guilty pleas, trial judge did not improperly consider nonstatutory aggravating factors concerning likelihood of rehabilitation and lack of remorse.

6. Homicide ⇐354

In imposing death sentence on defendant after conviction of felony-murder in first degree and burglary predicated on guilty pleas, defendant's juvenile record could be used to dispel mitigating circumstance that defendant had no significant prior criminal history.

7. Criminal Law ⇐728(2)

Defendant waived issue of whether State was permitted two closing arguments in prosecution for felony-murder in the first degree and burglary predicated on guilty pleas where both sides had equal opportunity for argument and defendant failed to make definite objection. West's F.S.A. Rules Crim.Proc., Rule 3.780(c).

8. Criminal Law ⇐1177

Even though it was improper for trial judge to impose general sentence after defendant was convicted of felony-murder in the first degree and burglary predicated on guilty pleas, that did not mandate reversal where no harm would be caused to defendant by that error, since imposition of death penalty for felony-murder prosecution was appropriate.

James B. Gibson, Public Defender and James R. Wulchak, Chief, Appellate Div., Asst. Public Defender of the Seventh Judicial Circuit, Daytona Beach, for appellant.

Jim Smith, Atty. Gen. and Shawn L. Briese, Asst. Atty. Gen., Daytona Beach, for appellee.

PER CURIAM.

This is a direct appeal from conviction of felony-murder in the first degree and burglary predicated on guilty pleas, and a sentence of death imposed by the trial court alone due to defendant's waiver of a sentencing jury. Art. V, § 3(b)(1), Fla.Const. Our sole task is to review the propriety of the death sentence.

In December of 1979, the body of an eighty-two year old woman dressed in a bloodstained nightgown was found lying on the floor of her bedroom. She had bruises on her forearm and under her ear, a small abrasion on her pelvis, and lacerations on her head, which were severe enough to cause death. She was sexually assaulted while alive, but the medical examiner could not determine whether the victim was conscious or unconscious during the battery. Strangulation was the cause of death.

Based upon a fingerprint identification, appellant was arrested. Although he initially denied knowledge of the incident, he later confessed to the burglary. He also admitted to stepping on the victim's stomach before leaving her house. A month later, when faced with laboratory test results, he admitted that he sexually assaulted the deceased. The grand jury returned an indictment charging the appellant with first-degree murder, burglary, and sexual battery.[1]

Pursuant to plea negotiations, appellant waived the right to a sentencing jury. After hearing and weighing the evidence, the trial judge imposed the death sentence, finding the existence of three aggravating circumstances: 1) the murder was committed during the commission of a rape; 2) the murder was committed for pecuniary gain; and 3) the murder was heinous. He considered and rejected all but one mitigating factor: appellant's inability to appreciate the criminality of his conduct. Due to the conflicting evidence, however, he decided that this factor deserved little weight.

We address first appellant's most forceful argument, in which he asserts that the trial judge erred in giving only little weight to the sole mitigating factor found, substantial impairment of capacity to appreciate the criminality of his act or to conform his conduct to the law.[2] The trial judge noted in his sentencing order, and the record supports, that although the experts agreed that Quince was not of normal intelligence, the exact degree of mental impairment could not be conclusively established. Four of the five experts that examined Quince found his mental condition did not warrant application of mitigating factors concerned with mental capacity. The fifth expert found Quince lacked the ability to appreciate the criminality of his acts, and compared his mental abilities to those of an eleven-year old. But age equivalency as an expression of Quince's mental ability was sharply questioned by one expert, and essentially rejected by another. The consensus seems to have been that Quince was of dull normal or borderline intelligence, but was not mentally retarded. No expert had found Quince incompetent to stand trial.

1. The sexual battery charge was later dismissed because it was the underlying felony to the felony-murder offense.

2. § 921.141(6)(f), Fla.Stat. (1979).

[1, 2] We are well aware that a defendant may be competent to stand trial, yet nevertheless receive the benefit of the mitigating factors involving diminished mental capacity. *See Mines v. State*, 390 So.2d 332, 337 (Fla.1980), *cert. denied*, 451 U.S. 916, 101 S.Ct. 1994, 68 L.Ed.2d 308 (1981). But we do not interpret *Mines* to require any more from a trial judge than that he give due consideration and weight to these factors in his sentence. Here the trial judge recognized the "substantial impairment" mitigating factor, but found that it did not outweigh the three aggravating factors.

This is not a case in which a jury has rendered a recommendation of life based on evidence of mental incapacity and the trial judge has rejected such a recommendation. *See, e.g., Neary v. State*, 384 So.2d 881 (Fla.1980); *Shue v. State*, 366 So.2d 387 (Fla.1978); *Jones v. State*, 332 So.2d 615 (Fla.1976). All of these cases are based on the rationale that the jury's recommendation can only be rejected for a compelling reason, because the jury represents "the conscience and mores of the community in which the crimes were committed." *Jones*, 332 So.2d at 622 (Sundberg, J., concurring). This is not a case in which the trial judge failed entirely to take the defendant's mental condition into account. *See Mines*. The trial judge demonstrated in his sentencing order his close consideration of this very factor. Nor is this a case in which the trial judge considered matters he should not have.

Rather, this is a case in which the appellant disagrees with the *weight* that the trial judge accorded the mitigating factor. But mere disagreement with the force to be given such evidence is an insufficient basis for challenging a sentence. *See Hargrave v. State*, 366 So.2d 1 (Fla.1978), *cert. denied*, 444 U.S. 919, 100 S.Ct. 239, 62 L.Ed.2d 176 (1979).

Neither of our sentence review functions, it will be noted, involves weighing or reevaluating the evidence adduced to establish aggravating and mitigating circumstances. Our sole concern on evidentiary matters is to determine whether there was sufficient competent evidence in the record from which the judge and jury could properly find the presence of appropriate aggravating or mitigating circumstances. If the findings of aggravating and mitigating circumstances are so supported, if the jury's recommendation was not unreasonably rejected, and if the death sentence is not disproportionate to others properly sustainable under the statute, the trial court's sentence must be sustained even though, had we been triers and weighers of fact, we might have reached a different result in an independent evaluation.

Brown v. Wainwright, 392 So.2d 1327, 1331 (Fla.1981), *cert. denied*, —— U.S. ——, 102 S.Ct. 542, 70 L.Ed.2d 407 (1981) (footnote omitted). The trial judge was not unreasonable in failing to give great weight to this mitigating factor, which he nevertheless did find to exist, in the light of contradictory evidence. The trial judge clearly did not ignore every aspect of the medical testimony as the judge did in *Huckaby v. State*, 343 So.2d 29 (Fla.), *cert. denied*, 434 U.S. 920, 98 S.Ct. 393, 54 L.Ed.2d 276 (1977).[3]

[3–5] Appellant further assails the sentence on sundry grounds. He claims the murder was not heinous. We believe that the severe beating, wounding, raping, and manual strangulation of an eighty-two year old, frail woman easily qualified as heinous. *Cf. Peek v. State*, 395 So.2d 492 (Fla.1980), *cert. denied*, 451 U.S. 964, 101 S.Ct. 2036, 68 L.Ed.2d 342 (1981) (beating, rape and strangulation of sixty-five year old woman is heinous). He next asserts that the underlying felony of sexual battery may not be used in aggravation. Florida's death penalty statute clearly allows the use of the underlying felony in aggravation, and that statute is constitutional. *See Proffitt v.*

3. *Huckaby v. State* also differs from the present case because the capital crime was rape of a child, for which imposition of death has since been declared unconstitutional. *Buford v. State*, 403 So.2d 943 (Fla.1981). There was also overwhelming evidence of defendant's mental illness in *Huckaby*.

Florida, 428 U.S. 242, 96 S.Ct. 2960, 49 L.Ed.2d 913 (1976). Appellant contends that there was an improper doubling of aggravating circumstances when the judge found that the homicide was committed during a rape and was committed for pecuniary gain,[4] and then used these facts as parts of his heinous finding. But doubling has been disallowed when the underlying felony is robbery or burglary and is considered in addition to the aggravating factor of "committed for pecuniary gain." *See Provence v. State*, 337 So.2d 783 (Fla.1976), *cert. denied*, 431 U.S. 969, 97 S.Ct. 2929, 53 L.Ed.2d 1065 (1977). Appellant argues an improper consideration of nonstatutory aggravating factors when evidence was given concerning likelihood of rehabilitation and lack of remorse. But neither of these factors were considered in aggravation by the judge in his sentencing order and were accorded no weight in the sentencing process.

[6] Quince complains that certain additional factors should have been found in mitigation. He posits that because his record of past offenses is a juvenile record and too remote, he should have been found to have no significant prior criminal history. This Court has allowed juvenile records to dispel this mitigating circumstance when the circumstances warrant. *See Brooker v. State*, 397 So.2d 910 (Fla.1981). These juvenile offenses were not trivial, and included armed robbery and burglary. Quince pleads that his age of twenty years is a mitigating factor. Yet, as we stated in *Peek v. State*, there is no per se rule that pinpoints an age as a mitigating factor. *Id.* at 498. *Peek* in fact upheld the rejection of the age of nineteen as a mitigating factor. Nor does the record support appellant's claim that the trial judge limited his consideration to only statutory mitigating circumstances.

[7] Quince finally assails the formalities of the sentencing procedure. He complains that the state was permitted two closing arguments in violation of Florida Rule of Criminal Procedure 3.780(c).[5] The record establishes, however, that both sides had an equal opportunity for argument. The appellant did not make a definite objection to the allowance of two arguments for both sides, and therefore waived this error. *See Clark v. State*, 363 So.2d 331 (Fla.1978); *State v. Jones*, 204 So.2d 515 (Fla.1967).

[8] Quince's final argument is that a general sentence was improperly imposed on him for two separate offenses, violating the dictates of *Dorfman v. State*, 351 So.2d 954 (Fla.1977). General sentences are also prohibited by statute. § 775.021(4), Fla. Stat. (1979). Although appellant is technically quite correct in asserting the trial judge was in error in imposing such a general sentence, and we must disapprove the practice, we cannot say that Quince's sentence is similar to that involved in *Dorfman*. The death sentence Quince received could only have been imposed for the murder he committed, not for the burglary. If we had vacated the murder conviction, the death sentence would necessarily have fallen. Thus, we face none of the "inscrutability" created by the general sentence in *Dorfman*. *Id.* at 957. Second, since death is deemed the proper penalty, concerns that a general sentence interferes with the rehabilitative process are moot. *See Dorfman*, 351 So.2d at 955 n. 7. We fail to see the harm caused to appellant by this error since he stands only to lose on resentencing, in light of our approval of the death penalty.

Although each murder conviction and death sentence presents amazingly unique circumstances, we find that death is the justifiable punishment in light of the existence of three aggravating factors and one mitigating factor, and that such a heavy penalty is proportionate to those meted out in similar cases. *See, e.g., Brooker v. State; McCrae v. State*, 395 So.2d 1145 (Fla.1980); *Peek v. State*.

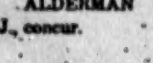
4. The appellant confessed both to the burglary and rape of the victim, and could hardly contest that these factors did not exist beyond a reasonable doubt.

5. "Both the state and the defendant will be given an equal opportunity for argument, each being allowed one argument. The state will present argument first."

Accordingly, the sentence of death is approved.

It is so ordered.

SUNDBERG, C. J., and ADKINS, BOYD, OVERTON, ALDERMAN and McDONALD, JJ., concur.



Virginia WEST, Petitioner,

v.

Richard B. WEST, Respondent.

No. 57305.

Supreme Court of Florida.

April 29, 1982.

Former wife sued former husband alleging that during their marriage the husband intentionally injured her by throwing her to the floor, causing a triple fracture of her left ankle. The Trial Court dismissed complaint for failure to state cause of action on ground of interspousal tort immunity, and the former wife appealed. The District Court of Appeal affirmed trial court's dismissal and certified question to the Supreme Court. The Supreme Court, Overton, J., held that former spouse cannot maintain an action in tort against other spouse for an intentional tort allegedly committed during marriage where marriage has since been dissolved by divorce.

Ordered accordingly.

Sundberg, C. J., and Adkins, J., dissented.

1. Husband and Wife ⇐205(2)

A former spouse cannot maintain an action in tort against other spouse for intentional tort allegedly committed during marriage where marriage has since been dissolved by divorce.

2. Divorce ⇐243, 252.4

Trial court in dissolution proceeding properly retained jurisdiction to award permanent alimony to former wife "in the event that modification is necessary in the future case of any disability the wife may have that is directly related to the injuries she sustained during her marriage to the Husband" and properly directed the former husband to pay all doctor, medical and hospital bills, not otherwise covered by insurance, which resulted from the husband's tortious injury to the wife.

Richard H. Langley, Clermont, for petitioner.

Arthur E. Roberts, Groveland, for respondent.

Elizabeth S. Baker, Miami, for Legal Services of Greater Miami, Inc.

Patricia Ireland, Miami, and Julia Dawson, North Miami, for Nat. Organization for Women in Florida and Florida Now.

Judith Bass, Miami, for Florida Ass'n of Women Lawyers.

Frances M. Farina, Miami Shores, for Florida Women's Political Caucus.

Roberta Fox of Gold & Fox, Coral Gables, H. Jack Klingensmith of Kuvin, Klingensmith & Lewis, South Miami, and Spencer Fox, Miami, for Cassandra Newby.

Bruce Rogow, Fort Lauderdale, for American Civil Liberties Union Foundation of Florida.

Dade County Advocate for Victims, Miami, and Forum, University of Miami, School of Law, Coral Gables, on brief for amicus curiae.

OVERTON, Judge.

Petitioner, Virginia West, sued her former husband, Richard B. West, alleging that during their marriage the husband intentionally injured her by throwing her to the floor, causing a triple fracture of her left ankle. The trial court dismissed the complaint for failure to state a cause of

IN THE SUPREME COURT OF FLORIDA

CASE NO. 59,954

KENNETH DARCELL QUINCE,
Appellant,
vs.
STATE OF FLORIDA,
Appellee.

MOTION FOR REHEARING

The Appellant, by his undersigned counsel, and pursuant to Rule 9.330, Florida Rules of Appellate Procedure, moves this Court for a rehearing in the above-styled cause. As grounds for the rehearing, the Appellant suggests that this Court has overlooked or misapprehended the following points of law or fact:

1. On page 2 of the slip opinion, this Court states that the record supports that "the exact degree of [Quince's] mental impairment could not be conclusively established" and that "[f]our of the five experts that examined Quince found his mental condition did not warrant application of mitigating factors concerned with mental capacity." However, it must be noted, and this Court has apparently overlooked the fact that only two experts were asked to examine the defendant for potential mitigating circumstances, (R 5-6, 7-8, 13-14) and only Dr. McMillan performed specific tests for this purpose. (T 115, 158) The two experts who examined Quince for mental impairment agreed that Quince was mentally retarded, and was "not functioning with all his marbles." (R 57; T 144, 157-158) Even the state's psychiatrist agreed that Quince was of below normal intelligence, functioning in the "dull-normal" range. (R 54; T 111, 128-129) Thus, contrary to this Court's opinion, the record does show Quince's exact degree of mental impairment.

The defendant's dull-normal, borderline retarded intelligence is surely a mitigating factor, either under Section 921.141(6)(f), Florida Statutes (1979), or else as a non-statutory mitigating factor. Moreover, the Court has misapprehended the reports of Drs. Rossario and Carrera. These psychiatrists did not find, as erroneously stated in the opinion, that Quince's mental condition did not warrant application of mitigating factors, since their reports and opinions were concerned solely with Quince's competence to stand trial and his sanity. Nonetheless, Dr. Rossario did indicate in his report that Quince's "judgement is markedly impaired...." (R 55)

Thus, this Court has overlooked and/or misapprehended the psychiatric reports conclusively showing, contrary to the trial judge's findings and this Court's opinion, that the mitigating factors (statutory and non-statutory) concerned with mental capacity are entitled to great weight which outweigh any aggravating factors.

2. Next, this Court in stating at slip opinion page 3, "Nor is this a case in which the trial judge considered matters he should not have," has overlooked the fact that the trial court allowed testimony, over defense objections, as to Quince's lack of remorse (T 56), and, in fact, personally elicited testimony concerning the possibility of Quince's rehabilitation. (T 148) See also slip opinion, at page 5. This non-statutory evidence was improperly elicited, admitted, and therefore presumably considered by the trial judge. See Elledge v. State, 346 So.2d 998, 1003 (Fla. 1977); Riley v. State, 366 So.2d 19 (Fla. 1978); Miller v. State, 373 So.2d 882 (Fla. 1979). The defendant's sentence was therefore impermissibly imposed in violation of Article I, Sections 9 and 17 of the Florida Constitution, and the Eighth and Fourteenth Amendments to the Constitution of the United States.

3. This Court, in its opinion at pages 3-4 exhibits a recent change in its sentence review function, claiming that this Court will no longer weigh or reevaluate evidence concerning aggravating or mitigating factors in comparison with prior decisions. This holding overlooks the mandate of State v. Dixon, 283 So.2d 1, 8 and 10 (Fla. 1973), Songer v. State, 322 So.2d 481, 484 (Fla. 1975), and Proffitt v. Florida, 428 U.S. 242 (1976), to determine independently whether the imposition of the ultimate penalty is warranted. As the Supreme Court of the United States noted in Proffitt, 428 U.S. at 252-253:

> The Florida capital-sentencing procedures thus seek to assure that the death penalty will not be imposed in an arbitrary or capricious manner. Moreover, to the extent that any risk to the contrary exists, it is minimized by Florida's appellate review system, under which the evidence of the aggravating and mitigating circumstances is reviewed and reweighed by the Supreme Court of Florida "to determine independently whether the imposition of the ultimate penalty is warranted." Songer v. State, 322 So.2d 481, 484 (1975). See also Sullivan v. State, 303 So.2d 632, 637 (1974)

This Court's change from its independent sentence review responsibilities, overlooks these decisions and renders Florida's death penalty unconstitutional under the Eighth and Fourteenth Amendments to the United States Constitution since the discretion of juries and judges is no longer controlled and channeled, and the penalty is being imposed and affirmed in an arbitrary and capricious manner.

4. In affirming the finding of heinous, atrocious, or cruel, this Court has overlooked the more gruesome facts of Halliwell v. State, 323 So.2d 557 (Fla. 1975); Burch v. State, 343 So.2d 831 (Fla. 1977); Chambers v. State, 339 So.2d 204 (Fla. 1976); Jones v. State, 332 So.2d 615 (Fla. 1976); and other cases in which this Court has found this aggravating circumstance to be lacking. In citing Peek v. State, 395 So.2d 492 (Fla. 1980), as a similarly heinous case, this Court overlooks the fact that the extremes present in Peek were simply not

present in the instant case; there were no crushed ribs nor the degree of suffering which was present in Peek. The victim in the instant case was not severely beaten, but was bruised on her arms only from striking the defendant. She was sexually assaulted when she was unconscious. (R 54) Additionally, the Court has overlooked the fact that any "heinousness" was caused by Quince's mental retardation and impairment. (T 144, 147-149) See Huckaby v. State, 343 So.2d 29, 34 (Fla. 1977); Miller v. State, 373 So.2d 882, 886 (Fla. 1979).

5. This Court, in rejecting Appellant's "doubling" argument states at pages 4-5 that doubling has only been disallowed when the underlying felony of robbery is considered in addition to the aggravating factor of "committed for pecuniary gain." This holding overlooks the decision of Clark v. State, 379 So.2d 97 (Fla. 1980), wherein an improper doubling was found by consideration of both factors of "for purpose of avoiding or preventing a lawful arrest" and "to disrupt or hinder a governmental function." See also Maggard v. State, 399 So.2d 973, 977 (Fla. 1981), wherein the Court found an improper doubling of burglary and pecuniary gain. The Court's opinion has misapprehended the "doubling" argument here. Appellant contended that the trial judge, in finding the sexual battery and burglary as aggravating circumstances, should not also have been allowed to refer to these factors in support of his finding of heinous, atrocious, or cruel. To do so violates Provence v. State, 337 So.2d 783, 786 (Fla. 1976). By using the fact of the sexual battery to make the crime heinous, and by using the burglary to make the killing heinous, the judge improperly referred to the same aspects of the defendant's crime to find three aggravating factors rather than two. The finding of heinous, atrocious, or cruel must be stricken as an improper doubling.

6. The Court, in rejecting the defendant's age of twenty as a mitigating factor, overlooks the cases of King v. State, 340 So.2d 315 (Fla. 1980) (age 23); Mikenas v. State, 367 So.2d 606 (Fla. 1978) (age 22); Hoy v. State, 353 So.2d 826 (Fla. 1977) (age 22); and Hallman v. State, 305 So.2d 180 (Fla. 1974) (age 23), wherein older ages in similar cases have been considered as mitigating factors. This Court also overlooked the fact that Quince's age can be coupled with the fact of his "dull-normal" intelligence to find a strong mitigating factor as was the case in Meeks v. State, 336 So.2d 1142 (Fla. 1976).

7. Finally, this Court's opinion overlooks the strong non-statutory mitigating factors of the defendant's tough personal and family life as argued at page 17 of the initial brief which factors were quite similar to those justifying a reversal to a life sentence in Neary v. State, 384 So.2d 881 (Fla. 1980). To overlook these mitigating factors renders the defendant's sentence unconstitutional under the rationale of Lockett v. Ohio, 438 U.S. 586 (1978), and under the comparative review standards required by Proffitt v. Florida, supra.

WHEREFORE, the appellant respectfully requests that this Honorable Court grant this motion for rehearing, withdraw the March 4th opinion in this cause, and reverse the case for imposition of a life sentence.

Respectfully submitted,

JAMES R. WULCHAK
CHIEF, APPELLATE DIVISION
ASSISTANT PUBLIC DEFENDER
1012 South Ridgewood Avenue
Daytona Beach, FL 32014
(904) 252-3367

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been hand delivered to: The Honorable Jim Smith, Attorney General, in his basket at the Fifth District Court of Appeal and mailed to: Mr. Kenneth D. Quince, Inmate No. 075812, Florida State Prison, P. O. Box 747, Starke, FL 32091 on this 17th day of March, 1982.

JAMES R. WULCHAK
CHIEF, APPELLATE DIVISION
ASSISTANT PUBLIC DEFENDER

Supreme Court of Florida

THURSDAY, MAY 27, 1982

KENNETH DARCELL QUINCE,

Appellant,

v.

STATE OF FLORIDA,

Appellee.

CASE NO. 59,954

Circuit Court No. 80-48-CC
(Volusia)

Upon consideration of the Motion for Rehearing filed in the above cause by attorney for Appellant,

IT IS ORDERED that said Motion be and the same is hereby denied.

A True Copy

TEST:

Sid J. White
Clerk, Supreme Court

By: Deputy Clerk

TC
cc: Hon. V. Y. Smith, Clerk
Hon. S. James Foxman, Judge

James R. Wulchak, Esquire
Shawn L. Briese, Esquire

STATE OF FLORIDA

VS.

KENNETH DARCELL QUINCE

IN THE CIRCUIT COURT OF THE SEVENTH JUDICIAL CIRCUIT IN AND FOR VOLUSIA COUNTY STATE OF FLORIDA, IN THE YEAR OF OUR LORD ONE THOUSAND NINE HUNDRED AND EIGHTY

INDICTMENT

THE FALL TERM GRAND JURY in and for VOLUSIA County, Florida, empaneled and sworn to inquire and true presentment make, hereby, in the name of and by the authority of the State of Florida, bring this prosecution and make the following charge or charges in THREE (3) counts:

COUNT I

CHARGE: Murder in the First Degree in Violation of F.S. 782.04

SPECIFICATIONS OF CHARGE: In that KENNETH DARCELL QUINCE, did, on or about the 28th day of December, 1979, in Volusia County, Florida, then and there unlawfully and from a premeditated design to effect the death of one Frances Bowdoin, a human being, did kill and murder Frances Bowdoin, by strangulation.

COUNT II

CHARGE: SEXUAL BATTERY in Violation of F.S. 794.011

SPECIFICATIONS OF CHARGE: In that KENNETH DARCELL QUINCE did, on or about the 28th day of December, 1979, in Volusia County, Florida, then and there unlawfully commit a sexual battery upon Frances Bowdoin, a person over the age of eleven (11) years, to-wit: 82 years of age by vaginal penetration or union with the sexual organ of another or the anal, or vaginal penetration of another by any other object, without the consent of Frances Bowdoin and in the process thereof used or threatened to use a deadly weapon or used actual physical force likely to cause serious personal injury.

COUNT III

CHARGE: BURGLARY OF OCCUPIED DWELLING, in Violation of F.S. 810.02

SPECIFICATIONS OF CHARGE: In that KENNETH DARCELL QUINCE did, on or about the 28th day of December, 1979, in Volusia County, Florida, did unlawfully commit burglary of a dwelling, the property of Frances Bowdoin located in the vicinity of 133 White St. Daytona Beach, in the County and State aforesaid, the same being occupied by Frances Bowdoin, a human being, with the intent to commit an offense therein, to-wit: Theft and in the course of committing said offense the said Kenneth Darcell Quince did make an assault upon Frances Bowdoin.

A TRUE BILL

Foreman of the Grand Jury

I, the undersigned State Attorney or Assistant State Attorney, as authorized and required by law, have advised the Grand Jury returning this indictment.

State Attorney
Seventh Judicial Circuit of Florida

This indictment presented by the aforesaid Grand Jury in open court this 17 day of January, 19 80, and on the 17 day of Jan. 19 80, at the hour of 3:45 P.M. was filed by me.

Clerk of the Circuit Court

IN THE CIRCUIT COURT, SEVENTH JUDICIAL CIRCUIT, IN AND FOR VOLUSIA COUNTY, FLORIDA.

CASE NO. 80-48-CC

STATE OF FLORIDA

vs.

KENNETH DARCELL QUINCE,

Defendant.

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OR 6988

BOOK 2210 PAGE 1598

JUDGMENT AND SENTENCE

You, KENNETH DARCELL QUINCE, being now before the Court attended by your attorney, HOWARD B. PEARL, and having pled Guilty to the crimes of Murder in the First Degree-Count I and Burglary of an Occupied Dwelling-Count III, the Court now adjudges you to be guilty of said offenses. What have you to say why the sentence of the law should not be pronounced upon you? Saying nothing, it is the sentence of the law and such is the Judgment of the Court that you, KENNETH DARCELL QUINCE, be delivered by the Sheriff of Volusia County, Florida, with a copy of this sentence forthwith, to the proper officer of the Department of Corrections, and by him safely kept until by warrant of the Governor of the State of Florida, you, KENNETH DARCELL QUINCE, be electrocuted until you are dedd. May God have mercy on your soul.

The Court's findings in support of the death penalty are filed concurrently herewith.

You are hereby notified of your right to appeal the finding of guilt and/or sentence within 30 days from the date hereof.

If you are an indigent person counsel will be appointed for you.

DONE AND ORDERED in Open Court at DeLand, Volusia County, Florida, this 21 day of October, 1980.

S. JAMES FOXMAN, CIRCUIT JUDGE

You are hereby adjudicated Guilty as to Count III and your sentence as to said Count shall run concurrent with Count I hereof.

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BOOK PAGE

IN THE CIRCUIT COURT,
SEVENTH JUDICIAL CIRCUIT,
IN AND FOR VOLUSIA
COUNTY, FLORIDA.

SPRING TERM, 1980
CASE NO. 80-48-CC

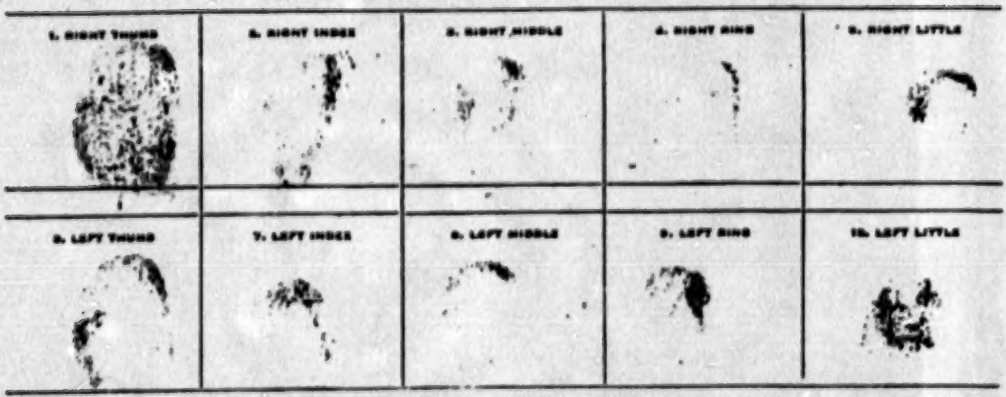
THE STATE OF FLORIDA

VS.

KENNETH DARCELL QUINCE

Defendant.

APPENDAGE TO JUDGMENT AND SENTENCE



I HEREBY CERTIFY that the above and foregoing fingerprints on this Judgment are the fingerprints of the Defendant KENNETH DARCELL QUINCE and that they were placed thereon by said Defendant in my presence in Open Court, this 21 day of October 19 80

Prints taken by;

Deputy Sheriff

S. JAMES FOSMAN Circuit Judge

Filed in Open Court and Recorded in Circuit Court Minute Book No. _____, Page _____, this 21st day of October 1980.

V. Y. SMITH
Clerk of Circuit Court,
Seventh Judicial Circuit,
Volusia County, Florida.

By _____,
Deputy Clerk

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IN THE CIRCUIT COURT, SEVENTH JUDICIAL CIRCUIT, IN AND FOR VOLUSIA COUNTY, FLORIDA.

CASE NO. 80-48-CC

STATE OF FLORIDA

vs.

KENNETH DARCELL QUINCE,

Defendant.

COURT'S FINDINGS OF FACTS IN SUPPORT OF THE DEATH PENALTY

I. INTRODUCTION:

On August 11, 1980 the Defendant, KENNETH DARCELL QUINCE, pled guilty to first degree murder and burglary of an occupied dwelling. The charge of sexual battery was merged into the murder charge. Both the Defense and the State affirmatively waived a sentencing jury. It was agreed to have the Court alone determine the proper sentence.

On October 20, 1980 a sentence hearing was held in DeLand, Florida. The Court heard live testimony, received evidence, and also received into evidence the reports of four psychiatrists and one psychologist. The Court also ordered and considered a Presentence Investigation Report dated August 28, 1980 (Presentence Investigation Report attached hereto as Court's Exhibit).

II. AGGRAVATING CIRCUMSTANCES:

The Court found that the following aggravating circumstances existed beyond a reasonable doubt:

1. F. S. 921.141(5)(d) - The murder was committed while the Defendant was committing rape.

2. F. S. 921.141(5)(f) - The murder was committed for pecuniary gain. (The Court does not feel this finding duplicates the finding of (5)(d); See St. vs. Brown, 381 So.2d 690 (Fl., 1980)).

3. F. S. 921.141 (5)(h) - The murder was especially heinous, atrocious and cruel. The strangulation of Frances Bowdoin by the Defendant during the burglary of her home might be heinous, atrocious and cruel in itself. But when the strangulation is accompanied by the rape of a frail 82 year old woman by a 20 year old,

6'4" defendant, the crime becomes unspeakable. It is shockingly evil and outrageously wicked.

The last moments of Frances Bowdoin's life were filled with terror. She saw the Defendant in her house. She closed her bedroom door. He broke into the bedroom. He silenced her screams on one, and perhaps two, occasions. She received two vicious blows to the top of her head. She received bruises defending herself. She was sexually assaulted while alive, and eventually strangled by the Defendant's hand. At one point while the deceased was lying on the floor, presumably dead or unconscious, the Defendant stepped on her stomach. Taking into account all the circumstances, the Court finds the Defendant was utterly indifferent to her suffering.

III. MITIGATING CIRCUMSTANCES:

As the Court found three aggravating circumstances existed, it will analyze each mitigating circumstance.

1. F. S. 921.141(6)(a) - The Court finds the Defendant has a significant prior criminal history. The Defendant's criminal history includes robbery charges and several burglary of dwellings. Although these offenses were committed while the Defendant was a juvenile, the Court feels his juvenile record represents a significant prior criminal history (See St. vs. Gibson, 351 So.2d 948 (Fl., 1980).

2. F. S. 921.141(6)(b) - The three experts who testified live at the sentencing hearing all agreed this criteria was not met. The Court agrees and finds it inapplicable.

3. F. S. 921.141(6)(c) - Not applicable.

4. F. S. 921.141(6)(d) - Not applicable.

5. F. S. 921.141(6)(e) - Not applicable.

6. F. S. 921.141(6)(f) - This criteria has caused the Court difficulty. All five experts agree the Defendant was of below normal intelligence. At least two felt he was on the borderline of mental retardation. Yet at the sentencing hearing two psychiatrists, one of whom was a defense witness, said this criteria did not exist. Only Dr. McMillan said it did exist.

Additionally, there was uncontradicted evidence that the Defendant did use alcohol and marijuana prior to the offense. Again, only Dr. McMillan feels this factor, in combination with

Defendant's low intelligence, meets the criteria of this mitigating factor.

The evidence regarding this mitigating factor is contradictory and confusing. The Court does note, however, that the Defendant's behavior and appearance at the plea and at the day long sentencing hearing seem to bear out the defense contentions. Giving the Defendant the benefit of the doubt the Court finds this mitigating factor does exist. The Court immediately adds that it does not feel this factor should be accorded much weight. It is not a strong and clear mitigating factor.

7. F. S. 921.141(6)(g) - The Court does not feel the Defendant's age is a mitigating factor. The Defendant was nearly 21 at the time of the offense. As far as the Court could tell, age played no part in this offense. The Court has read all the decisions regarding age as a mitigating factor it could find. It appears the question must be analyzed on a case by case basis. The Court has considered the Defendant's age and rejects it as a mitigating factor.

IV. CONCLUSION:

The Court found three aggravating and one mitigating circumstances. The Court finds the one mitigating factor is not entitled to a great deal of weight. The last aggravating factor (F. S. 921.141(5)(h)) is especially strong. The aggravating circumstances outweight the mitigating. The Defendant should be sentenced to death.

S. JAMES FOXMAN, CIRCUIT JUDGE

October 21, 1980

921.141 Sentence of death or life imprisonment capital felonies; further proceedings to determine sentence.--

(1) SEPARATE PROCEEDINGS ON ISSUE OF PENALTY.--Upon conviction or adjudication of guilt of a defendant of a capital felony, the court shall conduct a separate sentencing proceeding to determine whether the defendant should be sentenced to death or life imprisonment as authorized by s. 775.082. The proceeding shall be conducted by the trial judge before the trial jury as soon as practicable. If, through impossibility or inability, the trial jury is unable to reconvene for a hearing on the issue of penalty, having determined the guilt of the accused, the trial judge may summon a special juror or jurors as provided in chapter 913 to determine the issue of the imposition of the penalty. If the trial jury has been waived, or if the defendant pleded guilty, the sentencing proceeding shall be conducted before a jury impaneled for that purpose, unless waived by the defendant. In the proceeding, evidence may be presented as to any matter that the court deems relevant to the nature of the crime and the character of the defendant and shall include matters relating to any of the aggravating or mitigating circumstances enumerated in subsections (5) and (6). Any such evidence which the court deems to have probative value may be received, regardless of its admissibility under the exclusionary rules of evidence, provided the defendant is accorded a fair opportunity to rebut any hearsay statements. However, this subsection shall not be construed to authorize the introduction of any evidence secured in violation of the Constitution of the United States or the Constitution of the State of Florida. The state and the defendant or his counsel shall be permitted to present argument for or against sentence of death.

(2) ADVISORY SENTENCE BY THE JURY.--After hearing all the evidence, the jury shall deliberate and render an advisory sentence to the court, based upon the following matters:

(a) Whether sufficient aggravating circumstances exist as enumerated in subsection (5);

(b) Whether sufficient mitigating circumstances exist which outweigh the aggravating circumstances found to exist; and

(c) Based on these considerations, whether the defendant should be sentenced to life imprisonment or death.

(3) FINDINGS IN SUPPORT OF SENTENCE OF DEATH.--Notwithstanding the recommendation of a majority of the jury, the court, after weighing the aggravating and mitigating circumstances, shall enter a sentence of life imprisonment or death, but if the court imposes a sentence of death, it shall set forth in writing its findings upon which the sentence of death is based as to the facts:

(a) That sufficient aggravating circumstances exist as enumerated in subsection (5), and

(b) That there are insufficient mitigating circumstances to outweigh the aggravating circumstances.

In each case in which the court imposes the death sentence, the determination of the court shall be supported by specific written findings of fact based upon the circumstances in subsections (5) and (6) and upon the records of the trial and the sentencing proceedings. If the court does not make the findings requiring the death sentence, the court shall impose sentence of life imprisonment in accordance with s. 775.082.

(4) REVIEW OF JUDGMENT AND SENTENCE.--The judgment of conviction and sentence of death shall be subject to automatic review by the Supreme Court of Florida within 60 days after certification by the sentencing court of the entire record, unless the time is extended for an additional period not to exceed 30 days by the Supreme Court for good cause shown. Such review by the Supreme Court shall have priority over all other cases and shall be heard in accordance with rules promulgated by the supreme court.

(5) AGGRAVATING CIRCUMSTANCES.--Aggravating circumstances shall be limited to the following:

(a) The capital felony was committed by a person under sentence of imprisonment.

(b) The defendant was previously convicted of another capital felony or of a felony involving the use or threat of violence to the person.

(c) The defendant knowingly created a great risk of death to many persons.

(d) The capital felony was committed while the defendant was engaged, or was an accomplice, in the commission of, or an attempt to commit, or flight after committing or attempting to commit, any robbery, rape, arson, burglary, kidnapping, or aircraft piracy or the unlawful throwing, placing or discharging of a destructive device or bomb.

(e) The capital felony was committed for the purpose of avoiding or preventing a lawful arrest or effecting an escape from custody.

(f) The capital felony was committed for pecuniary gain.

(g) The capital felony was committed to disrupt or hinder the lawful exercise of any governmental function or the enforcement of laws.

(h) The capital felony was especially heinous, atrocious, or cruel.

(i) The capital felony was a homicide and was committed in a cold, calculated, and premeditated manner without any pretense of moral or legal justification.

(6) MITIGATING CIRCUMSTANCES.--Mitigating circumstances shall be the following:

(a) The defendant has no significant history of prior criminal activity.

(b) The capital felony was committed while the defendant was under the influence of extreme mental or emotional disturbance.

(c) The victim was a participant in the defendant's conduct or consented to the act.

(d) The defendant was an accomplice in the capital felony committed by another person and his participation was relatively minor.

(e) The defendant acted under extreme duress or under the substantial domination of another person.

(f) The capacity of the defendant to appreciate the criminality of his conduct or to conform his conduct to the requirements of law was substantially impaired.

(g) The age of the defendant at the time of the crime.

IN THE

SUPREME COURT OF THE UNITED STATES

Case No. 82-5096

KENNETH DARCELL QUINCE,

Petitioner,

vs.

STATE OF FLORIDA,

Respondent.

MOTION FOR LEAVE TO PROCEED
IN FORMA PAUPERIS

The Petitioner, KENNETH DARCELL QUINCE, through his undersigned counsel and prusuant to United States Supreme Court Rule 46, asks this Court for leave to proceed in forma pauperis. The Petitioner has been represented by appointed counsel throughout his state court trial and appeal proceedings, and his Affidavit in support of this Motion is attached.

Respectfully submitted,

BY: Ronald K. Zimmet

RONALD K. ZIMMET
Attorney for Petitioner
Chief Assistant Public Defender
1012 South Ridgewood Avenue
Daytona Beach, FL 32014-6183
(904) 252-3367

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been delivered by mail to: The Honorable Jim Smith, Attorney General, 125 N. Ridgewood Avenue, Daytona Beach, Florida 32014 on this 19th day of July, 1982.

BY: Ronald K. Zimmet

RONALD K. ZIMMET
Chief Assistant Public Defender

IN THE SUPREME COURT OF THE UNITED STATES

KENNETH DARCELL QUINCE,
Petitioner,

vs.

STATE OF FLORIDA,
Respondent.

CASE NO.

AFFIDAVIT IN SUPPORT OF PETITIONER'S MOTION TO PROCEED IN FORMA PAUPERIS

I, KENNETH DARCELL QUINCE, being first duly sworn, depose and say that I am the Petitioner in the above styled case; that in support of my motion to proceed on my Petition for Certiorari without being required to prepay fees, costs or give security therefor, I state that because of my poverty I am unable to pay the costs of said proceeding or give security therefor; and that I believe I am entitled to redress upon the issues presented in the Petition for Writ of Certiorari.

I further swear that:

1. I was convicted in the Circuit Court for Volusia County, Florida, for first degree murder and burglary following pleas of guilty.

2. I received a sentence of death for first degree murder and am presently in custody on Death Row at Florida State Prison.

3. I appealed to the Supreme Court of Florida and that Court affirmed my convictions and sentences.

4. I am not employed and have no source of income.

5. I do not have any real estate, stocks, bonds, notes, automobiles or any other valuable property.

6. I have been represented by appointed counsel throughout my state trial and appeal proceedings.

STATE OF FLORIDA
COUNTY OF _____

Kenneth Quince
KENNETH DARCELL QUINCE

Bonita L. Howard
NOTARY PUBLIC
Sworn to and subscribed
before me this 14th day
of June, 1982.

My Commission Expires:
NOTARY PUBLIC, STATE OF FLORIDA
My Commission Expires Aug. 24, 1985